# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1945

---

No. 337

UNITED STATES OF AMERICA, CROSS-PETITIONER

*v.*

THE CHICKASAW NATION AND THE CHOCTAW NATION

---

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

---

On June 25, 1945, the Chickasaw Nation filed a petition for a writ of certiorari in *Chickasaw Nation* v. *United States and the Choctaw Nation,* No. 169, seeking review of those parts of the judgment rendered in said case by the Court of Claims holding that the value of the land taken was $.50 per acre, that interest was due only from 1906 rather than from the date of taking in 1875, that the counterclaim of $57,500 by the United States should be allowed, and that the United States was entitled to gratuity offsets, such offsets not being needed in said case. A brief in opposition to the foregoing petition is being filed by the Government.

The Acting Solicitor General on behalf of the United States prays in the event the Court grants the petition for writ of certiorari in No. 169, but only in that event, that a cross-writ of certiorari be directed to the Court of Claims to review those portions of its judgment in this case which hold that the United States is under any liability to make payment to the Chickasaw Nation for its one-fourth interest in the land involved, and that the United States should pay interest on the amount awarded from February 19, 1906, to the date of judgment. The certified transcript of record filed in No. 169 includes those portions of the record upon which this cross-petition is based.

## OPINIONS BELOW

The opinion rendered by the Court of Claims on May 5, 1941, is reported in 94 C. Cls. 215.[1] The court's opinion of January 8, 1945 (R. 33–36) is not yet reported.

## JURISDICTION

The jurisdiction of the Court of Claims was invoked under the Act of June 7, 1924, 43 Stat. 537, as amended by the Joint Resolution of February 19, 1929, 45 Stat. 1229. The judgment sought to be reviewed was entered on January 8,

[1] Pertinent parts of this opinion are set forth in the Appendix, *infra*, pp. 15–21. References thereto will be indicated by (App.), while references to the printed record in No. 169 will be indicated by (R.).

1945 (R. 42). A motion by the Chickasaw Nation for a new trial was overruled on April 2, 1945 (R. 42). On June 27, 1945, the time within which to file a cross-petition for writ of certiorari was extended by Mr. Justice Rutledge to and including August 31, 1945. The jurisdiction of this Court is invoked under Section 4 of the Act of June 7, 1924, 43 Stat. 537, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

**QUESTIONS PRESENTED**

1. Whether this cross-petition is timely filed.

2. Whether the Choctaw Nation, rather than the United States, should make payment to the Chickasaw Nation for its one-fourth interest in the lands involved.

3. Whether, if the United States is deemed liable to the Chickasaw Nation, interest is allowable on the amount awarded, and, if so, whether the United States is entitled to recover that interest from the Choctaw Nation.

**STATEMENT**

This is a suit by the Chickasaw Nation to recover compensation for its one-fourth interest in the lands taken by the United States (R. 1–9). A full statement of the facts and statutes involved and of the proceedings in the Court of Claims is set forth in the brief of the United States in opposition, filed in No. 169, to which

reference is made. The facts and proceedings material for a consideration of this cross-petition are as follows:

In 1820 the United States ceded to the Choctaw Nation a tract of land west of the Mississippi River, lying between the Arkansas and Red Rivers, in exchange for a cession by the Choctaws of a portion of their lands in the State of Mississippi. 7 Stat. 210. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaw Nation receded to the United States the eastern portion of the tract so that the new eastern boundary was a line "beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence, due south, to Red River." When the eastern boundary was surveyed and marked later in 1825, the line erroneously veered to the west, thus excluding from the Choctaw country a triangular tract of 136,204.02 acres, which is the subject of this suit. (R. 37–38.) The error in the survey was not discovered until a new survey was begun in 1857, but at that time the old, incorrect line was retraced and remarked (R. 39–40). A dispute then arose as to the lands here involved, and by the Act of March 3, 1875, 18 Stat. 476, Congress declared the 1825 line to be the permanent boundary between the State of Arkansas and the Indian country (R. 40). Meanwhile, in 1837 the Chickasaw Nation had acquired a one-fourth interest in the Choctaw lands (R. 38–39).

Pursuant to the Jurisdictional Act of March 3, 1881, 21 Stat. 504, the Choctaws instituted a suit in the Court of Claims for an adjudication of their claims against the United States, including a claim for compensation for the taking of the same lands here involved. The court found the value of the lands to be $68,102 and awarded that amount to the Choctaws. *Choctaw Nation* v. *United States,* 21 C. Cls. 59, 72, 110, affirmed on this point, 119 U. S. 1, 41. The award was paid to the Choctaws on June 29, 1888. Thereafter the Chickasaws, since they owned a one-fourth interest in the lands, demanded of the Choctaws one-fourth of the amount recovered. (R. 41.) After much discussion the governments of the Choctaw and Chickasaw Nations in 1905 arrived at an agreement by which the Choctaws were to pay to the Chickasaws one-fourth of the recovery, less the costs of collecting, or a net sum of $16,003.97 (R. 41–42). This agreement was approved by the President of the United States on February 19, 1906. However, the Choctaw Nation never paid the agreed amount to the Chickasaw Nation. (R. 42.)

Under these circumstances, when the Chickasaw Nation filed the present suit to recover compensation for its interest in the same lands for which the United States had already paid the Choctaws in full, the United States impleaded the Choctaws pursuant to Section 6 of the Jurisdictional Act

(43 Stat. 537, 538) under which this suit was instituted, and filed a cross-complaint alleging that any judgment to which the Chickasaws might be entitled should be rendered against the Choctaws (R. 12–13). The Government also filed an answer denying any liability toward the Chickasaws and praying that (1) the petition be dismissed, (2) any judgment in favor of the Chickasaws be entered against the Choctaws, or (3) if judgment be entered against the United States, it have judgment for a like amount over against the Choctaws (R. 9–12). In their answer to the cross-complaint the Choctaws denied any liability toward either party (R. 14–15).

The Court of Claims found that the value of the lands in question was $68,102 as of March 3, 1875, and held that the Chickasaws were entitled to recover from the United States one-fourth of such value, or $17,025.50, with interest at 5 per cent per annum from February 19, 1906, the date of approval of the Choctaw-Chickasaw agreement (R. 26, 33; App. 17–18). However, the amount of this recovery was more than offset by the allowance of a government counterclaim against the Chickasaws, so that their suit was dismissed (R. 33, 42). On its cross-complaint the United States was awarded judgment for $16,003.97 without interest against the Choctaws (R. 33, 42; App. 20–21).

The judgment of the Court of Claims was entered on January 8, 1945, and the Chickasaws filed

a motion for new trial, which was denied on April 2, 1945 (R. 42). On June 25, 1945, the Chickasaws filed a petition for a writ of certiorari (No. 169), and on June 27, 1945, Mr. Justice Rutledge extended to August 31, 1945, the time within which to file this cross-petition, the order being made "provided the statutory time has not already expired."

REASONS FOR GRANTING THE WRIT

1. Section 4 of the Jurisdictional Act here involved, 43 Stat. 537, 538, provides—

> That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

This statute has been construed to authorize a writ of certiorari from this Court to the Court of Claims. *Choctaw Nation* v. *United States,* 318 U. S. 423; see also *Colgate* v. *United States,* 280 U. S. 43. Section 4 consequently assimilates the provisions of Section 3 (b) and Section 8 of the Act of February 13, 1925, as amended, with the attendant three-months' time limit for applications for certiorari.

The order of June 27, 1945, extending the time within which to file this cross-petition, was made "providing the statutory time has not already expired". This proviso raises the ques-

tion whether, in the absence of a motion for a new trial by the United States, the Government's time for filing a petition or obtaining an extension therefor expired on April 8, 1945 (three months after judgment), or on July 2, 1945 (three months after denial of the Chickasaws' motion for a new trial). There is no doubt that the Chickasaws had until July 2, 1945, to file their petition (*United States* v. *Seminole Nation*, 299 U. S. 417, 421), and we submit that the United States should be entitled to the same length of time within which to file its petition or obtain an extension. It is well-settled that the filing of a motion for a new trial suspends the finality of a judgment and tolls the running of the statutory period until the disposition of the motion. *Bowman* v. *Loperena*, 311 U. S. 262, 266; *United States* v. *Ellicott*, 223 U. S. 524, 539; *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675, 678, 680–681. Moreover, the finality of the judgment being in suspense until confirmation or modification by the court, it is immaterial that a petitioner did not himself move for a new trial. Cf. *Zimmern* v. *United States*, 298 U. S. 167, 168–170; *Meda* v. *Lawton*, 214 Cal. 588. If the rule were otherwise, a party not seeking relief in the trial court, in order to protect his interests, would be compelled to file one petition within three months after judgment and then file another petition in the event the judgment was

modified as a result of the new trial motion, thus bringing his case to the appellate court in fragments, a result contrary to appellate practice. *Catlin* v. *United States,* 324 U. S. 229, 233–234. If a new trial were granted, the situation would be much worse, with the appellate court being asked to give relief to one party while the trial court was considering the entire case. Hence, the order extending time having been entered within three months after the denial of a new trial, it is clear that there is no jurisdictional defect in the granting of the extension.

2. At the time of taking by the United States in 1875, the lands in question were owned in common by the Choctaw and Chickasaw Nations, the Choctaws owning three-fourths and the Chickasaws the remainder (R. 7, 38–39, 41). See *Choctaw Nation* v. *United States,* 318 U. S. 423, 424; *Choctaw Nation* v. *United States,* 83 C. Cls. 140. Inasmuch as the Chickasaws had at the time no right to bring suit against the United States, the act of the Choctaws in claiming compensation (*Choctaw Nation* v. *United States,* 21 C. Cls. 59) for the taking of these lands must be regarded as having been for the benefit of their co-tenants, the Chickasaws. Therefore, the United States, having made payment in full to the Choctaws in 1888 (R. 41), is under no liability to make another payment to the Chickasaws for the same lands. *Watson* v. *Union Gravel Co.,* 50 Mo. App. 635;

Tiffany on Real Property (2nd ed., 1920), sec. 199, pp. 678–679. Rather, the Choctaws, having received a proportionate share of the amount recovered in trust for the Chickasaws, are under a duty to account therefor to their co-tenants. *Coutant* v. *Catlin*, 2 Sand. Ch. 485, 489 (N. Y.); *Brinckerhoff* v. *Wemple*, 1 Wend. 470, 473–474 (N. Y.); *Legg* v *Legg*, 34 Wash. 132; cf. *Harris* v. *Howes*, 75 Me. 436; *McAllister* v. *Reel*, 53 Mo. App. 81, 85. See Restatement of the Law on Restitution (1939), sec. 125 and cases cited in the note thereto.

Moreover, both tribes in the 1905 agreement, subsequently ratified by the President in 1906 (R. 41–42), recognized that the Choctaws were under an obligation to make payment to the Chickasaws. The court below also recognized the liability of the Choctaws by ordering them to pay $16,003.97 to the United States (R. 42). However, instead of settling the case by adjudging that the Choctaws should make payment of $16,003.97 (one-fourth of the amount received, less the cost of collecting) to the Chickasaws, the court held the United States liable to Chickasaws with a right to recover over against the Choctaws. In so adjudicating a liability of the Choctaw Nation, the court reached the inequitable result of ordering the United States to make payment of $17,025.50 (one-fourth of the land value), with interest of

$33,102.77, to the Chickasaws and at the same time ordering the Choctaws to pay to the United States $16,003.97 (one-fourth of the amount received in 1888, less costs of collecting) without interest. (R. 42). The court below reasoned that inasmuch as the 1906 agreement between the two tribes was never executed by a Choctaw payment to the Chickasaws of their share ($16,003.97) of the funds awarded the Choctaws by the court below in 1886, the United States could not rely upon it as a settlement (App. 16–17, 19). But the court failed to recognize that the United States had absolved itself of all liability for the taking of the lands by payment in full to one of two co-tenants and that the claim of the Chickasaws against the United States, although couched in terms of a request for payment for a taking, was actually nothing more than a claim against the guardian for not prosecuting the ward's rights against third parties.

It is submitted, therefore, that liability rested primarily upon the Choctaw Tribe and that a direct judgment should have been entered in favor of the Chickasaws against the Choctaws. The statement of the court below (App. 16) that the Government in its cross-complaint requested that if judgment were rendered against it, a judgment in like amount should be given to it against the Choctaws is inaccurate. The Choctaws were made a party to this case under Section 6 of the Juris-

dictional Act,[2] and the Government's cross-complaint asked that any judgment "be made and entered against the Choctaw Nation and not against the United States" (R. 13). The Court of Claims had jurisdiction to render such judgment (*Chickasaw Nation* v. *United States,* 95 C. Cls. 192, reversed on other grounds, 318 U. S. 423) and should have done so, the Choctaws being primarily liable.

3. If procedural reasons require the United States to make payment to the Chickasaws in the first instance, then it is submitted that the Government is entitled to recover over against the Choctaws the same amount and, more urgently, that no interest should be allowed on the amount payable to the Chickasaws. In its answer, the United States alternatively asked recovery over against the Choctaws in the amount of any judgment in favor of the Chickasaws. The United States paid in full the just compensation required by the Fifth Amendment for the taking when in 1888 it paid $68,102 to the Choctaws, co-tenants with the Chickasaws (see *supra,* pp. 9–12). Thereafter, if the United States was under any duty toward the Chickasaws, it was merely to fulfill the Gov-

[2] Section 6 of the Jurisdictional Act of June 7, 1924, 43 Stat. 537, 538, provides:

"The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy."

ernment's obligation as guardian by seeing to it that the Chickasaws received their share of the payment made to the Choctaws.[3] For delay in effecting the transfer of the Chickasaws' share of the proceeds from the Choctaw fund in the Treasury,[4] neither the Fifth Amendment nor any statute or treaty requires or authorizes the payment of interest. In the absence of such authorization, it is clear that the court below erred in allowing interest to the Chickasaws from February 19, 1906, when the Choctaw-Chickasaw agreement was approved. *Cherokee Nation* v. *United States,* 270 U. S. 476, 487, 490; R. S. sec. 1091, 28 U. S. C. sec. 284.

4. In the field of Indian law this case is *sui generis.* While the United States regards the questions raised by this cross-petition as having

[3] Thus, instead of the recovery of $17,025.50 allowed by the Court of Claims, the amount of recovery by the Chickasaws should be $16,003.97, one-fourth of the amount paid to the Choctaws, less the expense of collecting. This is the same amount agreed upon by the tribes in 1905 (R. 41–42) and ordered by the court to be paid by the Choctaws to the United States (R. 42).

[4] At all material times there were Choctaw funds on deposit in the Treasury. Report of Commissioner of Indian Affairs (1888), pp. viii–ix; Report of Commissioner of Indian Affairs (1906), p. 450; Report of Commissioner of Indian Affairs (1920), p. 200. If the transfer of funds could not have been effected by administrative action alone, there was ample authority under Section 18 of the Act of April 26, 1906, 34 Stat. 137, 144, to litigate the Chickasaws' claim against the Choctaws and pay any judgment rendered out of Choctaw funds.

substantial importance, it does not urge that they are of sufficient importance taken alone to justify review, and accordingly it does not desire to press its cross-petition in the event certiorari is denied to the Chickasaw Nation in No. 169. If, on the other hand, certiorari is there granted, we believe that the entire judgment of the Court of Claims, presenting as it does a doubtful interpretation of the interrelationship between the United States and the Indian tribes, should be reviewed.

CONCLUSION

For the reasons stated, and on the condition suggested above, it is respectfully submitted that this cross-petition for a writ of certiorari be granted.

HAROLD JUDSON,
*Acting Solicitor General.*

AUGUST 1945.

## APPENDIX

The pertinent portions of the opinion rendered on May 5, 1941, by the Court of Claims in *Chickasaw Nation* v. *United States and Choctaw Nation*, 94 C. Cls. 215, are as follows:

> JONES, *Judge*, delivered the opinion of the court:
>
> The Chickasaw Nation as plaintiff instituted this suit to recover the value of a one-fourth interest in certain lands in a triangular strip between two surveys of the eastern boundary line of a general tract of land that had been ceded to the Choctaw Nation in 1825.
>
> The plaintiff, the Chickasaw Nation, claims that by the Treaties of 1820 (7 Stat. 210), and 1825 (7 Stat. 234), the United States Government ceded a tract of land in Arkansas and Oklahoma to the Choctaw Nation; that in running the eastern boundary line of such tract an error was made; that the treaty called for a line running due south from a point one hundred paces east of Fort Smith, but that the surveyor bore to the west and did not cover in the actual survey all the lands ceded to the Choctaws; that in 1837 the plaintiff purchased an interest in all these lands; and that by the Act of Congress approved March 3, 1875, supra, the erroneous survey was confirmed and the disputed strip transferred to the public domain, thus depriving the plaintiff of its interest in the disputed strip.
>
> The defendant admits the error in the original survey, but claims that the lands were taken, not by the Act of March 3, 1875,

but by the original survey made in November and December 1825, pursuant to the Treaty of 1825, and that the lands therefore were taken from the Choctaw Nation alone before the Chickasaw Nation had purchased an interest in the tract.

Defendant filed a cross complaint against the Choctaw Nation pleading that if judgment is rendered against it in favor of the Chickasaw Nation, defendant be given in like amount over against the Choctaw Nation. Hereafter in this opinion the term defendant, unless otherwise specified, refers to the United States.

* * * * *

The defendant further urges that following the Net Proceeds case, which allotted to the Choctaw Nation $68,102.00 in payment for the land in question, the Chickasaw Nation contended for its part of this fund, and that subsequent to the payment of the judgment by the United States to the Choctaw Nation, the Chickasaw and Choctaw Nations by action of their respective legislative councils, duly approved by the President of the United States, agreed that the Chickasaw Nation should accept from the Choctaw Nation, and that the Choctaw Nation should pay to the Chickasaw Nation, an amount equal to one-fourth of the judgment of $68,102.00 less $1,021.53, which it was agreed was the Chickasaws' pro rata share of the cost incurred by the Choctaw Nation in prosecuting the suit.

The plaintiff urges that such agreement is not binding on the ground that the Chickasaw and Choctaw Nations, under the law prevailing at that time, had no right to make such a treaty or agreement. However, as the warrant was never issued and

the money was never paid to the Chickasaw Nation, we cannot see how the defendant is in a position to invoke this understanding as a settlement of its obligation. *Brown* v. *Spofford,* 95 U. S. 474, 477.

The defendant had the right to make the Chickasaw Nation a party to the Net Proceeds case. It did not see fit to do so. The fact that it settled with the Choctaw Nation did not in any sense constitute a settlement with the Chickasaw Nation. While the Chickasaw Nation had indicated its willingness to accept a one-fourth interest in the money which the Choctaw Nation had received in payment of the judgment, since it was not actually paid, it certainly did not relieve the defendant of the obligation to settle with the Chickasaw Nation for whatever rights it had in the premises.

The plaintiff contends that the value of the lands in question in 1875 was more than 50¢ per acre. However, after exhaustive study the Court of Claims in the Net Proceeds case, decided January 25, 1886, found that to be the value of the lands. This finding was not disturbed by the Supreme Court in passing upon the case. The lands in the public domain were sold and offered for sale in this particular area from $1.25 per acre to as low as 12½¢ per acre over a period of years.

The only additional evidence which plaintiff offered was some tax valuations and some sales of lands in this particular area during the period between 1870 and 1880. These records, however, are incomplete. They do not show the nature of the land listed, nor what improvements may have been located on any of the tracts at that time.

The valuation placed upon this property by the Court of Claims and approved by the Supreme Court was as near to a correct valuation as can be reasonably ascertained at this time. We, therefore, find that the value of the lands on March 3, 1875, was $68,102.00.

Since for a long period of time the basis of settlement of rights between the Choctaws and Chickasaws in respect to the lands was three-fourths to the Choctaws and one-fourth to the Chickasaws, and since the defendant had recognized this basis of division in numerous accountings, the plaintiff is entitled to recover one-fourth of the value of the lands. Under the previous decisions of the Supreme Court just compensation for lands taken from the Indians has been construed by the court to include interest. Ordinarily interest would be calculated from the date of the legal taking of the lands, March 3, 1875. *United States* v. *Creek Nation,* and *Shoshone Tribe* v. *United States, supra.*

However, the facts in this case are unusual. The plaintiff asserted no affirmative interest in this particular strip of land until after the decision in the Net Proceeds case in 1886, indeed until after the payment of the judgment in that case in 1888.

Later the Chickasaws began to claim a one-fourth interest in the proceeds of the judgment that had been rendered in favor of the Choctaws. Following considerable discussion they entered into a treaty or agreement with the Choctaws whereby they were to be paid $16,003.97 as their part, less expense of the suit, of the funds that had been recovered in that case. This treaty or agreement was approved by the

President of the United States on February 19, 1906.

In view of these and other facts of this case as well as the long period that has elapsed, we find that the payment of $17,025.50 (one-fourth of the sum of $68,102.00) with interest thereon from February 19, 1906, at the rate of 5 percent per annum constitutes just compensation for the interest in the lands taken from the Chickasaws. As to the date from which interest should be calculated, see *City of Ft. Worth* v. *McCamey*, 93 Fed. (2d) 964, 968, 969, and cases cited.

Even if it were found that the Chickasaw Nation had no affirmative title to the lands in question, it undoubtedly had purchased sufficient rights in the lands to be entitled to a one-fourth interest in the proceeds of all sales and leases of land and mineral rights. In the disposition of all such proceeds since 1837 it had been allotted one-fourth. By the agreement of 1905 it was to be paid by the Choctaws a sum equal to one-fourth of the amount paid to the Choctaws in the Net Proceeds case. This agreement was approved by the President February 19, 1906. The money of both tribes was on deposit in the Treasury of the United States.

Before defendant could claim exemption from liability to the Chickasaws for their interest in the proceeds of the lands which defendant had taken, it seems logical to hold that defendant would be obligated to see that their part of the moneys was actually paid to them.

Thus substantially the same result is reached whichever horn of the dilemma is chosen.

Is the defendant entitled to recover on its cross action against the Choctaw Indians?

At the time the judgment in the Net Proceeds case was collected, the Choctaws were fully aware of the interest of the Chickasaws. They had sold the Chickasaws a one-fourth interest in their lands. For many years in all proceeds arising from the disposition and leasing of these lands the Chickasaws had received one-fourth.

In accordance with this custom, practice, and interest, the Choctaws had promised by the Agreement and Treaty of 1905 to pay to the Chickasaws one-fourth of the net proceeds of that judgment. The agreement to pay this amount was approved by the President of the United States.

Accordingly, therefore, defendant is entitled to recover on its cross action against the Choctaw Nation the sum of $16,003.97, the amount which all parties to this suit agreed should be paid by the Choctaws to the Chickasaw Nation.

Since there was no stipulation for interest on this amount, since the claim is for a part of the moneys paid to the Choctaw Nation for the taking of lands in which the Chickasaws had an interest, and because of the peculiar relationship existing between the defendant and the Choctaw Nation, and because of the delay of the defendant in seeking a return of the money from the Choctaws, we do not think this obligation for the return of funds should bear interest prior to the date of entry of judgment herein. *United States* v. *Sanborn,* 135 U. S. 271, 281. This position is all the more conclusive because of the distinctions made by the Supreme Court in the case of *Goltra* v. *United States,* decided February 3, 1941 (312 U. S. 203).

We do not think the doctrine that money voluntarily paid cannot be recovered should be applied to the instant case, *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, 211, 212.

Plaintiff is entitled to recover, but the determination of the amount of the recovery and the amount of offsets, if any (See Rule 39a), is reserved for further proceedings; and the defendant, the United States, is entitled to recover over against the Choctaw Nation the sum of $16,003.97.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

U. S. GOVERNMENT PRINTING OFFICE: 1948